Supreme Court, U.S.
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No.

In the Supreme Court of the United States

OCTOBER TERM, 1995

JAMES C. MORGAN, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

PETITION FOR WRIT OF CERTIORARI

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December 1994

HOPP

QUESTIONS PRESENTED

I

Whether the military judge erred by admitting the complainant's hearsay statement under the residual hearsay exception, when the said statement did not have "particularized guarantees of trustworthiness" as required by the Confrontation Clause of the United States Constitution.

II

Whether the Court of Appeals erred by holding that improperly admitting the petitioner's wife's hearsay statements was harmless error.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Constitutional Provision Involved	2
Statement of the Case	2
Reasons for Granting the Writ	5
Conclusion	10
Appendix A	1a
Appendix B	19a

TABLE OF AUTHORITIES

SUPREME COURT CASES: Page

Idaho v. Wright, 497 U.S. 805 (1990) 6
Ohio v. Roberts, 448 U.S. 56 (1980) 5

MILITARY CASES:

United States v. Bahr, 33 M.J. 228 (C.M.A. 1991) 10
United States v. Carpenter, 37 M.J. 291 (C.M.A. 1993) 10
United States v. Barror, 23 M.J. 370 (C.M.A. 1987) 5
United States v. Hines, 23 M.J. 124 (C.M.A. 1986) 5
United States v. McGrath, 39 M.J. 158 (C.M.A. 1994) 9
United States v. Morgan, unpublished, ACM 29592 (A.F.C.M.R. 30 April 1993); 40 M.J. ___ (C.M.A. 1994) 4

MILITARY RULES OF EVIDENCE:

M.R.E. 801 5
M.R.E. 802 5
M.R.E. 803 5
M.R.E. 804 5

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PETITION FOR WRIT OF CERTIORARI

The petitioner, James C. Morgan, respectfully prays that a writ of certiorari issue to review the order and judgment of the United States Court of Appeals for the Armed Forces entered in his case on 20 September 1994.

OPINIONS BELOW

The order and judgment of the United States Court of Appeals for the Armed Forces, reported at 40 M.J. ____ (C.M.A. 1994), is located at Appendix A. The decision of the United States Air Force Court of Criminal Appeals, unpublished, ACM 29592, (A.F.C.M.R. 30 April 1993), is located at Appendix B.

JURISDICTION

The final order of the United States Court of Appeals for the Armed Forces was entered on 20 September 1994.

The jurisdiction of this Court is invoked under 28 U.S.C.A. § 1259(3) (Supp. 1993) and 10 U.S.C.A. § 867(a) (Supp. 1993).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution states: "In all criminal prosecutions the accused shall enjoy the right . . . to be confronted with the witnesses against him . . ."

STATEMENT OF THE CASE

On 28 December 1990, Shaquilla Demika Jones (also known as Angel, but referred to as "Ann" in the U.S. Court of Appeals decision) appeared at the doorstep of Ms. Vera E. Reidesel, a neighbor of the Morgan family who lived on Andrews Air Force Base. R. 366. Ms. Reidesel let Angel into her house and when asked what she could do for the girl, she said, "My stepdad raped me." R. 367. Ms. Reidesel, herself a prior rape victim, advised the girl not to wash herself and proceeded to question her about the incident. R. 368.

Angel used Reidesel's telephone to call her aunt who lived in North Carolina. The aunt called the girl's mother at work and Ms. Morgan called the security police. Pros. Ex. 2. Ms. Morgan told the police that the petitioner was supposed to pick her up at the Base Exchange where she worked.

Security policemen were dispatched to the Reidesel home, where the girl was interrogated. The Air Force Office of Special Investigations (AFOSI) was informed and Special Agent (SA) Ron Helms was detailed to the case. R. 396. He interrogated the girl in the presence of SA Neil Duke at the security police station. A written statement was subsequently typed by SA Helms and the girl signed it. R. 396-400; Pros. Ex. 1.

Angel was then transported by AFOSI SA Lynn Shell to the Prince George's County Sexual Assault Center, which is located in the Prince George's Hospital. R. 106-07. She arrived between about 1900 and 2000 on 28 December 1990 and was interviewed by Ms. Vicki Turner. R. 106-08, 384. Turner was allowed to testify that Angel told her that she had been home watching television in a bedroom when her father came into the room. R. 109, 385. According to Turner, Angel described how the petitioner had placed his hand on her back, touched her "backside" and her chest, and then put his penis into her vagina "just a little bit." *Id.* Turner only spoke with the girl for 30-45 minutes. R. 110.

The girl was also interviewed that evening by Dr. Nainan Thomas, PhD, supervisor of the Child Sexual Abuse Services Program of the Department of Social Services. R. 123, 348-49. Thomas had been manning the "Child Abuse Hotline" when AFOSI reported the incident. R. 349. He directed the police to bring the girl to the Prince George's Hospital where he and Turner interrogated her. Thomas told her that he wanted to talk to her to "find out exactly what happened so that [he] could counsel her on a crisis counseling and also determine the safety of her in remaining in her home." R. 124, 350.

Mrs. Morgan also made two written statements to the AFOSI on 28 and 31 December 1990.

A medical examination, done for the purpose of collecting evidence, showed no lacerations, bruising, or other signs of physical or sexual assault. R. 388-90, Pros. Ex. 5.

The petitioner was court-martialed, and charged with, *inter alia,* the rape of Angel. Trial defense counsel moved to suppress the out of court statements of Angel and Mrs. Morgan. App. Ex. IX, XVIII, XIX.

The prosecution of this case rested squarely on the credibility of the complaining witness, Angel. The prosecution, to shore up the obvious credibility problems

associated with this witness, offered a variety of written and oral hearsay statements made by the girl. In addition, the prosecutors sought the admissibility of hearsay statements purportedly made by the petitioner's wife. The defense timely objected.

Mrs. Morgan had taken her daughter with her to North Carolina, and the two had declined to return to Maryland for the trial. The prosecutors issued subpoenas to Mrs. Morgan and to Angel, but to no avail. Warrants of attachment were then served on both women by federal marshals in North Carolina. The women were manacled hand and foot and brought back to Andrews AFB for trial in leg irons and chains. Even after this abusive treatment, Mrs. Morgan declined to testify against her husband. The prosecutors, therefore, opted to attempt to introduce her two out of court statements in an attempt to prove the petitioner guilty. The petitioner was found not guilty of rape, but guilty of indecent acts. He was sentenced to a bad conduct discharge, confinement for 30 months, and reduction to E-1.

The United States Air Force Court of Criminal Appeals affirmed the finding of guilty to indecent acts, with a minor amendment. Because of the amendment, the Court reduced the confinement time to 24 months. The Court also agreed with the trial judge's denial of the defense motion to suppress the statements of Angel and Mrs. Morgan. *United States v. Morgan,* unpublished, ACM 29592 (A.F.C.M.R. 30 April 1993).

The United States Court of Appeals for the Armed Forces affirmed the conviction, holding that the statements made by Angel were properly admitted. Although the Court held that the statements made by Mrs. Morgan to the OSI was improperly admitted, they held that the error was harmless. *United States v. Morgan,* 40 M.J. ___ (C.M.A. 1994).

REASONS FOR GRANTING THE WRIT

Generally, statements other than the one made by the declarant while testifying at trial and offered for the truth of the matters asserted therein are not admissible in trials by court-martial. Mil.R.Evid. 801 & 802. Such statements may, however, be received into evidence when they fall into one of the several narrowly defined exceptions to the general rule of exclusion. Mil.R.Evid. 803 & 804. In the event that a hearsay statement does not fall into one of the specifically delineated exceptions, it may *only* be received into evidence when it is accompanied by such circumstantial guarantees of trustworthiness that the infringement of the petitioner's right to confrontation is justified. *Ohio v. Roberts,* 448 U.S. 56, 100 S.Ct. 2531, 65 L. Ed. 2d 597 (1980); *United States v. Hines,* 23 M.J. 125 (C.M.A. 1986); *United States v. Barror,* 23 M.J. 370 (C.M.A. 1987); Mil.R.Evid. 803(24) & 804(b)(5).

While there were several statements that were admitted into evidence at trial, the petitioner only requests that three of them be reviewed by this Honorable Court: I) the written statement made by Angel, with the assistance of AFOSI SA Helms, and II) the two written statements made by Mrs. Morgan, and given to the AFOSI. Each will be addressed separately.

I

Angel's Statement to AFOSI

The military judge admitted Jones' 28 December 1990 statement to AFOSI agents under the residual hearsay exception. R. 242-44. That provision states:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> . . .

> (24) *Other exceptions.* A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. . . .

Mil.R.Evid. 803(24) (emphasis in original).

The petitioner submits that the military judge's refusal to suppress this statement was prejudicially erroneous. This Court has recently addressed the propriety of admitting hearsay under the residual exception in child abuse cases. In *Idaho v. Wright,* 497 U.S. 805, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990). Justice O'Connor stated:

> Although we have recognized that hearsay rules and the Confrontation Clause are generally designed to protect similar values, we have also been careful not to equate the Confrontation Clause's prohibitions with the general rule prohibiting the admission of hearsay statements. The Confrontation Clause, in other words, bars the admission of some evidence that would otherwise be admissible under an exception to the hearsay rule.

Idaho, 111 L.Ed.2d at 651 (citations omitted). Therefore, a simple hearsay analysis regarding the admission of a hearsay statement in the context of a criminal case is not sufficient to meet constitutional requirements.

Justice O'Connor went on to summarize the current state of the law on the confrontation issue. First, the pros-

ecution must establish the unavailability of the witness whose statement the prosecutor purports to use against the criminal defendant. *Id.* Second, the statement is only admissible "if it bears adequate 'indicia of reliability.' " *Id.* at 652. Reliability is assumed if the admission of the hearsay is based on a " 'firmly rooted hearsay exception;' " otherwise, the evidence must be excluded unless there is a showing of " 'particularized guarantees of trustworthiness.' " (citations omitted). *Id.* Justice O'Connor then noted some of the "firmly rooted hearsay exceptions" to include "excited utterance," "medical treatment," co-conspirator statements, and "dying declaration." *Id.* at 655.

When the hearsay exception under which the out of court statement is admitted is not a "firmly rooted hearsay exception," then the " 'particularized guarantees of trustworthiness' must be shown from the totality of the circumstances, but . . . the relevant circumstances include only those that surround the making of the statement and that render the declarant particularly worthy of belief. . . . [I]f the declarant's truthfulness is so clear from the surrounding circumstances that the test of cross-examination would be of marginal utility, then the hearsay rule does not bar admission of the statement at trial." *Id.* The statement must be "so trustworthy that adversarial testing would add little to its reliability." *Id.* at 656. "[U]nless an affirmative reason, arising from the circumstances in which the statement was made, provides a basis for rebutting the presumption that a hearsay statement is not worthy of reliance at trial, the Confrontation Clause requires exclusion of the out-of-court statement." *Id.* "To be admissible under the Confrontation Clause, hearsay evidence used to convict a defendant must possess indicia of reliability *by virtue of its inherent trustworthiness, not be reference to other evidence at trial.*" *Id.* at 657 (emphasis added).

In this case, the petitioner submits that the statement of Angel does not bear the circumstantial guarantees of trustworthiness necessary to justify its admission. As noted above, this girl's track record for lying speaks for itself. She had previously falsely accused her step-father and had told her friends lies about having a rich doctor for a real father. Contrary to the military judge's findings of fact, this girl had every motive to fabricate this story. She obviously wanted to return to North Carolina to live with her permissive grandmother. The fact that the statement was typed by AFOSI SA Helms suggests that law enforcement agents had a hand in its construction, heightening suspicion that it was the product of leading or suggestive interview techniques. The judge's determination that this statement bore sufficient circumstantial guarantees of trustworthiness to justify its admission under the residual hearsay exception is, therefore, patently erroneous and should be disapproved.

The petitioner further contends that the military judge erred by considering the other evidence in the case in determining that the statement "is realistic and makes logical sense under the circumstances." R. 243. This language makes clear that the judge compared the statement to the "circumstances" of the case, as revealed in the other evidence relating to the alleged offense in deciding whether the statement was trustworthy. That is the very process condemned by Justice O'Connor in *Idaho v. Wright, supra.* This admissibility of this hearsay statement was not permitted to rise or fall on its own merit – it was held up against the other evidence in the case and the fact that it was consistent with that other evidence was considered in the decision to admit it. The military judge's application of this erroneous legal standard alone justifies reversal of his decision to allow this statement into evidence.

As Judge Wiss pointed out in his dissent, the majority, like the trial court, also considered circumstances other than those that immediately and directly surround the making of Angel's statement to SA Helms to measure the statement's trustworthiness so as to qualify it as admissible under the residual hearsay exception. This is contrary to the holding in *United States v. McGrath,* 39 M.J. 158 (C.M.A. 1994) and *Idaho v. Wright, supra. Morgan, supra,* (Wiss, J., dissenting).

II

Mrs. Morgan's Statements

As he did with Angel's 28 December 1990 statement to AFOSI, the military judge admitted Mrs. Morgan's 28 December 1990 and 31 December 1990 statements to AFOSI on the theory that they fell within the residual exception to the hearsay prohibition under Mil.R.Evid. 803(5).

Much for the same reasons that Angel's statement should have been excluded, the military judge erred when he denied trial defense counsel's motion to suppress Mrs. Morgan's statements. As stated earlier, the Court of Appeals for the Armed Forces disagreed with the trial judge, and held that the admission of Mrs. Morgan's statements was error. However, the Court held that such admission was harmless beyond a reasonable doubt.

In his dissent, Chief Judge Sullivan said that this erroneous admission was not harmless beyond a reasonable doubt. He pointed out that even the government recognizes the probative value of this evidence in the petitioner's case. The government's brief states that "it is obvious why Appellant did not want his wife's statements admitted since they corroborate the statements of the victim, and since her 31 December 1990 statement contains appellant's

admission to sexual activity with his step-daughter after being confronted by his wife with the victim's allegations." Gov't brief at 21. *Morgan, supra,* (Sullivan, C.J., dissenting). An error of constitutional dimensions can only be determined harmless if the Court is convinced beyond a reasonable doubt that the error did not effect the outcome. *See United States v. Bahr,* 33 M.J. 228, 231 (C.M.A. 1991). *But see United States v. Carpenter,* 37 M.J. 291 (C.M.A. 1993). Here, that can hardly be said to be the case. The error was obviously prejudicial.

CONCLUSION

The entanglement of hearsay rules and the Confrontation Clause has created numerous confusing issues for the courts to resolve. Clear guidance as to what constitutes "circumstantial guarantees of trustworthiness" required for residual hearsay exceptions and what constitutes "particularized guarantees of trustworthiness" required under Confrontation Clause analysis will reduce future litigation in this important area. Resolution of this will have a wide impact in both the military and civilian justice systems.

Respectfully submitted,

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December 1994

APPENDICES

APPENDIX A

UNITED STATES COURT OF MILITARY APPEALS

No. 93-1070
CMR No. 29592

UNITED STATES, APPELLEE

v.

JAMES C. MORGAN, STAFF SERGEANT
U.S. AIR FORCE, APPELLANT

Argued May 9, 1994
Decided Sep. 20, 1994

Counsel

For Appellant: *Captain J. Knight Champion III* (argued); *Colonel Jay L. Cohen* and *Captain Ursula P. Moul* (on brief); *Colonel Terry J. Woodhouse.*

For Appellee: Major Barnard N. Madsen (argued); *Lieutenant Colonel Thomas E. Schlegel* (on brief); *Colonel Jeffery T. Infelise* and *Colonel Richard L. Purdon.*

Military Judge: Perry L. Anderson

Opinion of the Court

Cox, Judge:

This is yet another case where a military accused is convicted based upon out-of-court declarations of the wit-

nesses against him. The four hearsay statements admitted into evidence arise out of allegations by the victim (whom we will call Ann – not her real name) that she was raped by appellant, her stepfather.[1]

FACTS

On December 28, 1990, at approximately 1:37 p.m., Ann ran over to the house of her neighbor, Mrs. Vera Riedesel. Seeing that Ann "was very upset." Mrs. Riedesel invited her into her home. Upon questioning the child as to why "she was . . . crying hysterically," the girl replied that "my stepdad raped me." Ann explained that her stepfather (appellant) "went a little bit in . . . [her]" and that he had done the same thing on "three or four other times and once was all the way in." While at Mrs. Riedesel's house, Ann first "tried to call her mother" but "was unable to get her." When these attempts were unsuccessful, "she [called] . . . her aunt" in North Carolina and told her of the alleged rape. The aunt, in turn, called Ann's mother, Mrs. Morgan, who was at work in an office at the base exchange. Mrs. Morgan then telephoned the security police and informed them of the allgeged rape.

The security police arrived at Mrs. Riedesel's residence about an hour after the alleged rape. First Lieutenant (Lt.) Baur stated that, when he arrived at the house, the victim was "very quiet" and "very withdrawn." He told Ann he was informed that she had been "sexually molested" by her

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[1] In July 1991, appellant was tried by a general court-martial with members at Andrews Air Force Base, Maryland. Contrary to his pleas, appellant was convicted of one specification each of committing indecent acts on his 13-year-old stepdaughter, and communicating a threat, in violation of Article 134, Uniform Code of Military Justice, 10 USC § 934. Appellant was sentenced to a bad-conduct discharge, confinement for 30 months, and reduction to Private E-1. The convening authority approved the sentence.

stepfather and that these were "very serious" allegations. Upon asking the child if this information was true, she stated that her stepfather did indeed rape her. Lt. Baur and Ann then left Mrs. Riedesel's home and went to the Security Police Headquarters at Andrews Air Force Base, Maryland.

At the security police building, Ann was interviewed by Office of Special Investigations (OSI) Special Agent (SA) Ronald Helms. This statement was reduced to a typewritten document, which was sworn to and signed by Ann. Following this, Ann was taken to the Prince George's County Sexual Assault Center [hereinafter SAC] located in Prince George's General Hospital in Upper Marlboro, Maryland. While at the SAC, Ann gave a statement concerning the alleged rape to Ms. Vicki Turner, a social worker and intake counselor at the center. After speaking with Ms. Turner, Ann was interviewed by Dr. Nainan Thomas (Ph.D. in "human development"), the supervising social worker at the SAC. Ann gave a third statement to Dr. Thomas, detailing a history of sexual abuse by appellant.[2]

In the meantime, Mrs. Morgan, the victim's mother, was interviewed by the Security Police and OSI. She executed a handwritten statement relating the substance of the telephone conversation she had had with her sister. This statement relates that the sister informed Mrs. Morgan that Ann reported that appellant had raped her. A few days later Mrs. Morgan gave a more detailed statement to the OSI, setting forth other incidents of sexual abuse.

At the time of trial, Mrs. Morgan and Ann refused to

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[2] A medical exam was conducted later that evening. The attending physician found no signs of general physical trauma, anogenital trauma, or of sperm or seminal fluid. The physician did note that Ann had a "perforated" hymen, however.

respond to a number of subpoenas served upon them in North Carolina. The military judge, therefore, issued a warrant of attachment which wss served by a U.S. Marshal. Ann and her mother were then returned to Andrews AFB in the custody of a marshal.

At a subsequent hearing, Mrs. Morgan stated under affirmation that she would not testify against appellant. The military judge then declared Mrs. Morgan to be "unavailable" in accordance with Mil.R.Evid. 804(a)(2), Manual for Courts-Martial, United States, 1984, and admitted her prior written statements into evidence under the residual hearsay exception set out in Mil.R.Evid. 804(b)(5). Like her mother, Ann also expressed a desire not to testify at trial. However, Ann did state she would be willing to adopt her prior written statements at trial and attest to their truth.[3] Accordingly, the military judge admitted Ann's various statements into evidence pursuant to Mil.r.Evid. 803(2), 803(4) and 803(24).

I

LAW AND ANALYSIS OF THE STATEMENTS

Statement I

The Victim's Statement to Her Neighbor, Mrs. Riedesel

The military judge concluded that Ann's statement to her neighbor, Mrs. Riedesel, were admissible under the excited-utterance exception to the hearsay rule—Mil.R. Evid. 803(2). We agree.

Mil.R.Evid. 803(2) provides:

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[3] Despite Ann's failure to testify in her own words at trial, the defense was given an opportunity to cross-examine her concerning the alleged rape and each of her prior written statements.

> The following are not excluded by the heresay rule, even though the declarant is available as a witness:
>
> * * *
>
> (2) *Excited utterance.* A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

Ann's statement to Mrs. Riedesel is a textbook example of an excited utterance. *See generally United States v. Arnold,* 25 MJ 129 (CMA 1987) *cert. denied,* 484 U.S. 1060 (1988). The statement was made soon after the alleged rape while Ann was crying and acting in an hysterical manner. The circumstances ensure the statement was spontaneous and impulsive, and not the product of reflection and deliberation.

II

Victim's Statements to Civilian Social Workers

The military judge determined that Ann's statements to Ms. Vicki Turner and Dr. Nainan Thomas were admissible in evidence under the medical-treatment exception to the hearsay rule—Mil.R.Evid. 803(4). We accept the conclusions of the military judge.

Mil.R.Evid. 803(4) provides:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> * * *
>
> (4) *Statements for purposes of medical diagnosis or treatment.* Statements made for purposes of medical diagnosis or treatment and described medical history, or past or present symptoms, pain, or sensation, or

> the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

We note at the outset that applicability of Mil.R.Evid. 803(4) is not limited to statements made to medically licensed doctors. *United States v. Welch,* 25 MJ 23, 25 (CMA 1987); *see United States v. Nelson,* 25 MJ 110, 112 (CMA 1987), *cert. denied,* 484 U.S. 1061 (1988). Given the proper circumstances, statements made to psychologists, social workers, and other health care professionals may well fall within the purview of the medical-treatment exception to the hearsay rule. *United States v. Welch,* 25 MJ at 25. The key factor in determining whether a particular statement is embraced by the medical-treatment exception is "the state of mind or motive of the patient in giving the information to the physician and the expectation or perception of the patient that if he or she gives truthful information, it will help him or her to be healed." *United States v. Clark,* 35 MJ 98, 105 (CMA 1992), *quoting United States v. White,* 25 MJ 50, 51 (CMA 1987). The statement "must be made by a declarant 'for the purpose of [medical] diagnosis and treatment.' " *United States v. Armstrong,* 36 MJ 311, 313 (CMA 1993), *quoting* 25 MJ at 112.

Here the military judge found as a matter of fact that the admitted statements were "made for the purpose of medical diagnosis or treatment." Evidence in the record supports this finding in that it shows that Ms. Turner and Dr. Thomas explained to the child that the SAC was a "place where people can come" to get help with "their problems" and that their roles as social workers was to ensure her physical and emotional well-being. Similarly, there was testimony by the child indicating she understood the purpose of the SAC is to help sexual abuse victims like

herself. During the interviews the victim continually sought counseling regarding her emotions and fears about pregnancy, and the ramifications her allegations of sexual abuse might have on her family and home life. She also expressed an interest in receiving "follow-up" counseling in the future. While there is some evidence in the record to suggest that Ann spoke to Ms. Turner and Dr. Thomas because she thought she had to as part of the investigatory process, we are not prepared to say the military judge's findings of fact are "unsupported by the evidence" or "clearly erroneous." *United States v. Middleton,* 10 MJ 123, 133 (CMA 1981); *see also United States v. Burris,* 21 MJ 140, 145 (CMA 1985). Accordingly, we hold the military judge did not err in finding that Ann's statements to Ms. Turner and Dr. Thomas were admissible under Mil.R.Evid. 803(4).

III

The Victim's Statement to OSI

A few hours after the alleged rape Ann gave a statement to OSI Special Agent Ronald Helms at the Andrews AFB security police building. The statement was reduced to a typewritten document, which was sworn to and signed by her. The military judge determined the statement was admissible in evidence under the residual hearsay exception set out in Mil.R.Evid 803(24).

Mil.R.Evid. 803(24) provides.

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> * * *
>
> (24) *Other exceptions.* A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthi-

> ness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. . . .

Ann's statement to the OSI concerns the circumstances of the alleged rape. There is no question that is is relevant "evidence of a material fact." Mil.R.Evid. 803(24); *see* Mil.R.Evid. 401 and 402. Although the child was reluctant to testify at trial about the details of the alleged rape, she did agree to adopt her written statement and did certify to its truth while under oath. The written statement, albeit heresay, therefore, was the functional equivalent of the direct testimony of the accusatrix. Absent the actual, spoken testimony of the child, we believe her statement to the OSI was "more probative" on the issue of whether the alleged rape actually occurred than would be any other evidence reasonably available to the Government.

The "interests of justice" clause "has not proved significant in decisions construing" Mil.r.Evid. 803(24), *United States v. Hines*, 23 MJ 125, 134 (CMA 1986). However, the issue of reliability must be resolved, and we now turn to it.

When the Confrontation Clause of the Sixth Amendment is not at issue,[4] the military judge may consider all relevant facts in determining whether the "equivalent circumstantial guarantees of trustworthiness" requirement of

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[4] Since Ann was subject to full and effective cross-examination at trial, the Confrontation Clause is not implicated in this case with regard to Ann's out-of-court statements. *See infra.*

Mil.R.Evid. 803(24) is met. *United States v. McGrath,* 39 MJ 158, 166 (CMA 1994).[5] In this case a number of factors support the reliability of Ann's statement to the OSI. First, she signed her statement under oath. Second, she did not recant her statement when given the opportunity at trial, but rather, certified as to its truth. Third, the statement was made to the OSI less than 3 hours after the alleged attack. Fourth, no cogent motivation was suggested for the child to lie. Fifth, the statement was entirely consistent with her excited utterance to the neighbor. And finally, Ann was a member of the accused's household and looked to him for financial support. The societal stigma that undoubtedly attached to her as a result of her accusations of sexual abuse must be considered as nothing less than personally devastating.

In light of the above, we find Ann's statement to the OSI to be particularly worthy of belief and hold that the military judge did not err when he admitted the statement under Mil.R.Evid. 803(24).

We likewise find that appellant's right to confront the victim was not violated. The Confrontation Clause of the Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." The central purpose behind this Consitutional provision is to prevent "paper trials" and to allow the accused an adequate opportunity to cross-examine adverse witnesses. *United States v. Owens,* 484 U.S. 554, 557 (1988); *California v. Green,*

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[5] When the Confrontation Clause is of concern, guarantees of trustworthiness of an out-of-court statement must be shown from only those circumstances that "surround the making of the statement and that render the declarant particularly worthy of belief." *Idaho v. Wright,* 497 U.S. 805, 819 (1990). In such circumstances outside corroborating evidence cannot be used to "bootstrap" the trustworthiness of the hearsay statement. *Id.* at 823.

399 U.S. 149, 157 (1970). Although the Supreme Court has "recognized that hearsay rules and the Confrontation Clause are generally designed to protect similar values," the Court has

> been careful not to equate the Confrontation Clause's prohibitions with the general rule prohibiting the admission of heresay statements. The Confrontation Clause, in other words, bars the admission of some evidence that would otherwise be admissible under an exception to the hearsay rule.

Idaho v. Wright, 497 U.S. 805, 814 (1990) (citations omitted).

Although the Confrontation Clause may sometimes limit admissibility "of some evidence that would otherwise be admissible under" the Military Rules of Evidence, there is no confrontation issue when the declarant testifies as a witness and is "subject to unrestricted cross-examination" by opposing counsel. *United States v. Owens,* 484 U.S. at 560; *California v. Green,* 399 U.S. at 159; *United States v. Lyons,* 36 MJ 183, 188 (CMA 1992) (Crawford, J., concurring in the result). In the instant case, the victim took the stand at trial and was subject to unrestricted cross-examination by the defense. Although the military judge allowed Ann to adopt her out-of-court statement as her in-court testimony, defense counsel still had the opportunity to conduct effective cross-examination of the witness. We hold there is no confrontation issue with regard to Ann's out-of-court statements. Accordingly, the military judge did not err on either evidentiary or Constitutional grounds when he admitted the child's out-of-court statements into evidence.

IV

Mrs. Morgan's Statements to OSI

Mrs. Morgan executed two written statements to the OSI. When she refused to testify at trial, the military judge found her "unavailable" under Mil.R.Evid. 804(a)(2) and admitted both statements into evidence under the residual hearsay exception—Mil.R.Evid. 804(b)(5). Regardless whether Mrs. Morgan was "unavailable" within the meaning of the rule, we believe the military judge erred in admitting the statements.[6] However, even if Mrs. Morgan

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[6] A court order demanding that a witness testify is an essential requisite to a finding of unavailability under that Rule. Many federal courts are in accord with this view. *See, e.g., United States v. Zappola,* 646 F2d 48, 54 (2d Cir. 1981) ("[A]n order from the court is an essential component in a declaration of unavailability under [Federal] Rule 804(a)(2)." (Citation omitted)); *United States v. Inadi,* 748 F.2d 812, 819-20 (3d Cir. 1984) ("The government has taken, at various stages in these proceedings, several different approaches to establishing [the witness'] unavailability. It first asked the trial judge to rely on the assurances of government counsel that [the witness] was adamantly refusing to testify and was prepared to go to jail for contempt. . . . Such predictions by government counsel cannot be recognized as the equivalent of the actual scenario where a witness has appeared in court and refused to testify after a court order. Every veteran trial judge has experienced the situation where a hostile witness discards his 'stonewalling' tactics when faced with an imminent contempt citation."), *rev'd on other grounds,* 475 U.S. 387 (1986). *Cf. Jennings v. Maynard,* 946 F.2d 1502, 1505 (10th Cir. 1991) ("Although both the Oklahoma Code and Federal Rule 804(a)(2) normally require the court to order a witness to testify before a finding of unavailability is made, we conclude that such an order was not necessary in this case. During the in camera hearing, [the witness] testified that he would not obey a court order requiring him to testify. Further, the trial court determined that [the witness'] reason for refusing to testify—that threats . . . were made against [the witness] and his family—made an order to testify inappropriate.").

were truly "unavailable," her statements to the OSI were nevertheless inadmissible. First, much in the statements constitutes "double" or even "triple" hearsay, *i.e.*, my sister said the neighbor said that my daughter said. That is most unreliable. Second, the circumstances surrounding the making of the statement cannot be said to be supported by any "particularized guarantees of trustworthiness." *Idaho v. Wright, supra* at 815; *see also United States v. Hines,* 23 MJ at 137. The wife's out-of-court declarations were inadmissible and the military judge erred by admitting them.

We find that the military judge's error in admitting Mrs. Morgan's statements under Mil.R.Evid. 804(b)(5) was harmless beyond any reasonable doubt. *United States v. Moreno,* 36 MJ 107, 121 (CMA 1992). Mrs. Morgan's statements to the OSI were not essential to the prosecution's case; much of the substance of her statements concerned matter that was cumulative of other evidence introduced at trial, and most importantly, the finders of fact had an opportunity to view and hear from the most critical witness, the victim herself. Accordingly, we hold that admission of Mrs. Morgan's statements in evidence under Mil.R.Evid. 804(b)(5) does not constitute reversible error.

The decision of the United States Air Force Court of Military Review is affirmed.

Judges CRAWFORD and GIERKE concur.

SULLIVAN, Chief Judge (dissenting):

I agree with the first two parts of the majority opinion. I do not agree with Part III that concerns admissibility of the victim's statement to the Office of Special Investigations. *See United States v. McGrath,* 39 MJ 158, 169 (CMA 1994) (Sullivan, C.J., dissenting). In addition, I do not agree that error in admission of Mrs. Morgan's out-of-court statement given on December 31, 1990, was harmless beyond a reasonable doubt.

Her statement on the above date reads as follows:

> In late 1986 after we returned from Aviono, Italy, JAMES CURTIS MORGAN[,] [A], my two sons and I moved into the Allen Bee Gardens Apartments, Forestville, MD. One day I asked [A] if anyone had ever done anything to her and told her not to tell me. [A] did not say anything at first, but then she asked me if I knew what a prostitute was. I said yes and asked her way she asked me that. [A] told me a prostitute layed down for people and she had done that for Daddy (JAMES CURTIS MORGAN). [A] told me Daddy told her not to tell anyone about what he had done with her. I asked what he had done and [A] told me he had gotten on top of her and put his thing in her private part. *I call JAMES CURTIS MORGAN at his work with the 1776 Security Police Squadron, Andrews AFB, MD, and asked him what he had done to [A]. JAMES CURTIS MORGAN told me it happened while we were in Europe and that [A] did not tell it right. He told me [A] would come and lay down beside him. Later she started to get on top of him and ask him if he loved me (mama). Then he stated [A] got brave and began to rub him on his penis. When I asked him why he did not tell me about this, JAMES CURTIS MORGAN stated he was afraid I would*

> *leave him.* A couple of months after we moved onto base at 1165 A Hall Court, AAFB, MD, I left JAMES CURTIS MORGAN with [A] and my two sons and moved to my mother's home in North Carolina. A couple of months later, [A] told me JAMES CURTIS MORGAN had put his penis inside her while we lived in the Allen Bee Garden Apartments, Forestville, MD. Approximately 3 weeks ago, JAMES CURTIS MORGAN and I were haveing [sic] a big arguement [sic] when [A] interrupted. *During the argument JAMES CURTIS MORGAN got very quiet and apologitic [sic] when [A] stated she had something to tell me. He got so quiet I knew in my heart JAMES CURTIS MORGAN had been messing with [A].* On 28 Dec 90, I got a call from my sister, SHEILA JONES, in North Carolina who told me that [A] had called her and stated JAMES CURTIS MORGAN had raped [A]. I called the Security Police Desk and reported the incident as I could not take it anymore. When JAMES CURTIS MORGAN came to pick me up, he put the two boys in the Security Police truck with me and the security police man. He drove to the Security Police building alone and parked in the parking lot. When I saw JAMES CURTIS MORGAN I knew he had a gun although I had no way to prove it. He has told me in the past he would kill me and him if I ever left him. When I left JAMES CURTIS MORGAN and moved to North Carolina, I never intended to return to him. I was seperated [sic] from him for approximately 2 ½ years. I didn't report this incident to anyone because I though [sic] separation would take care of the problem.

(Emphasis added)

Even the Government recognizes the probative value of this evidence in appellant's case. Its Answer states: "It is

obvious why Appellant did not want his wife's statements admitted since they corroborate the statements of the victim, and since her 31 December 1990 statement contains Appellant's admission to sexual activity with his stepdaughter after being confronted by his wife with the victim's allegations." Answer at 21. As noted below, such a conclusion is justified by the record of trial before us.

The Government's case was based *primarily* on three out-of-court statements by a 13-year-old child-victim. The defense's theory at trial was that the victim initially made those statements because she was generally frustrated with family problems around the time she alleged rape. Furthermore, defense counsel contended that, at trial, the child was merely perpetuating these earlier lies. Thus the focus of the trial was on the victim's credibility. Evidence by a third party that corroborated the victim's statements and provided a purported admission by appellant certainly could have tipped the balance of the weight of the evidence against him. Accordingly, I find that "there is a reasonable possibility that the evidence complained of might have contributed to the conviction," and therefore the military judge's error in admitting Mrs. Morgan's statements was not harmless beyond a reasonable doubt. *Chapman v. California,* 386 U.S. 18, 23 (1967), *quoting Fahy v. Connecticut,* 375 U.S. 85, 86-87 (1963); *cf. United States v. Grooters,* 39 MJ 269, 273 (CMA 1994).

WISS, Judge (dissenting):

I agree with the majority opinion except for Part III and the harmless-error analysis in Part IV. As to the latter, I agree with the Chief Judge's reasoning that Mrs. Morgan's statement cannot be seen beyond reasonable doubt to be harmless. Rather than being rather innocuous and cumulative, as the majority portrays it, I believe that the full statement as set out in the Chief Judge's separate opinion reveals it as a significant substantive addition to the corpus of the prosecution's evidence.

As to Part III, the majority considers circumstances other than those "that immediately and directly surround[ ] the making of" Ann's statement to Agent Helms of the Office of Special Investigations (OSI) to measure the statement's trustworthiness so as to qualify it as admissible under Mil.R.Evid. 803(24), Manual for Courts-Martial, United States, 1984. *See United States v. McGrath,* 39 MJ 158, 172 (CMA 1994) (Wiss, J., dissenting). Under my reading of that rule, consideration of such circumstances in the trustworthiness analysis is not permissible. *Id.*

Additionally, I believe that the majority has erred by shuffling past one of the three absolute prerequisites for admission of hearsay under Mil.R.Evid. 803(24): that "the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts. . . ." In this regard, the majority simply opines: "*Absent the actual, spoken testimony of the child,* we believe her statement to the OSI was 'more probative' on the issue of whether the alleged rape actually occurred than would be any other evidence reasonably available to the Government." ____ MJ at (7) (emphasis added).

The difficulty is in the majority's predicate assumption: The child's testimony *was available* to the prosecution—

there simply was no *absence* of her testimony. The following portion of the girl's testimony, which immediately follows a few introductory questions and answers, demonstrates that it simply was the witness' discomfort and unease which led the Government to its shortcut through the rules of evidence:

Q. Now, [Ann], you know why we're here today, don't you?
A. Yes.
Q. Why are you here?
A. For a trial.
Q. Okay, and what are we trying to find out in this trial?
A. What happened to me.
Q. Specifically you and who else?
A. And my Dad.
Q. How do you feel about testifying here today and talking about what happened with you and your stepdad?
A. I don't want to talk about it.
Q. You don't like to talk about it.
A. No.
Q. I will try to make it a little easier for you. I am going to show you a document that we have marked as Government (Prosecution) Exhibit 1, and I am going to show it to you. . . .

Then, what follows is a series of questions—many leading—in which trial counsel obtains affirmative answers to questions whether certain events that are reflected in her pretrial statement occurred. A reading of her full statement leaves no doubt at all that, while the witness was ill at ease, her testimony at all times was there for the asking. In this context, the out-of-court statement cannot be characterized as "more probative . . . than any other evidence

which the proponent can procure through reasonable efforts"—it surely was not more probative than her live, in-court testimony, and that testimony was readily procurable.

In sum, I believe that Ann's pretrial statement was admitted improperly under Mil.R.Evid. 803(24) in two separate respects and that admission of her mother's out-of-court statement was not harmless error. Accordingly, I would set aside the findings and sentence and authorize a rehearing.

APPENDIX B

UNITED STATES AIR FORCE COURT
OF MILITARY REVIEW

ACM 29592

UNITED STATES

v.

STAFF SERGEANT JAMES C. MORGAN, FR230-94-3612
UNITED STATES AIR FORCE

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30 April 1993

Sentence adjudged 23 July 1991 by GCM convened at Andrews Air Force Base, Maryland. Military Judge; Perry L. Anderson.

Approved sentence: Bad-conduct discharge, confinement for 2 years and 6 months, and reduction to E-1.

Appellate Counsel for the Appellant: Colonel Jeffrey R. Owens and Captain Michael D. Burt.

Appellate Counsel for the United States: Lieutenant Colonel Brenda J. Hollis, Major Paul H. Blackwell, Jr., Captain David C. Wesley, and Captain Carlos L. McDade.

Before

O'HAIR, SNYDER, and GRUNICK
Appellate Military Judges

OPINION OF THE COURT

GRUNICK, Judge:

In a general court-martial tried before members, appellant was convicted, contrary to his pleas of a specification of indecent acts, on divers occasions, with his minor step-daughter, and communication of a threat, violations of Article 134, UCMJ. The approved sentence includes a bad-conduct discharge, confinement for 2 years and 6 months, and reduction to E-1.

Appellant alleges the government failed to produce sufficient evidence to support his conviction and the military judge erred in several of his evidentiary rulings and during instructions. We do not find prejudicial error, but the state of the evidence leads us to modify the findings and sentence. We otherwise affirm the results.

FACTS

Appellant was a security policeman (SP) with over 12 years of service. During the summer of 1990, his 13-year-old step-daughter, SJ, returned from staying with her grandmother. She was sent away by her mother because the girl had previously complained appellant had been "messing with" her. When she returned to appellant's home, weekly sexual touching began and continued until 28 December 1990, when SJ went to a neighbor, in tears, complaining appellant raped her. Security police investigators were advised of the complaint and found appellant with his wife at the base exchange. Appellant was informed of the allegations and agreed to follow investigators to their office.

Instead of following investigators to their office, appellant took his pistol and held it to his head for 4 hours while he remained parked alone in his car. After 4 hours of holding himself hostage, appellant reliquished his weapon to

his flight commander, but not before he threatened to run through SP barricades with his car and take an SP "with me."

After the initial complaint, the step-daughter was interviewed by AFOSI investigators, state social welfare case workers, and examined by a doctor. The week before trial, SJ and her mother fled to another state although subpoenaed to appear. Trial was delayed several days while U.S. marshals intervened and brought these two reluctant witnesses to trial. Appellant's wife refused to testify and although SJ did not refuse, she expressed reluctance to go into details. Trial counsel relied heavily on the step-daughter's acknowledgement that her previous statements were true and introduced them against the appellant.

SUFFICIENCY OF THE EVIDENCE

Appellant attacks the factual and legal sufficiency of the evidence. The primary basis for this assertion arises from appellant's acquittal of rape allegations from the 1986-1987 time frame and during the last half of 1990. Appellant asserts his step-daughter was unworthy of belief and the members' finding him guilty, by exceptions and substitutions, of indecent acts with a minor was not supported by the evidence.

During an Article 39(a), UCMJ, session on findings instructions, trial counsel proposed a lesser included offense instruction for indecent acts with a minor. Defense counsel did not object to this proposal or the instruction given by the military judge advising the members they could find appellant guilty of the lesser offense of indecent acts, "by putting his hands on her breasts and buttocks and genital area." In finding appellant guilty of indecent acts with a minor, the members substituted the instructed language.

We do not find sufficient evidence in the record for the fact-finder to find appellant guilty of putting his hands on the genital area of his step-daughter, SJ. The primary focus during the examination of SJ and the investigation was whether sexual intercourse had occurred. When SJ expressed reluctance to discuss the details of the sexual assaults, the presentation of the case boiled down to what she previously told others. SJ frequently described what appellant did as "messing with her." The most specific description by SJ of the indecent acts occurred when she was questioned by Ms. Turner, a counselor at the Sexual Assault Center. SJ told the counselor appellant would touch her "backside and chest." In an interview given to AFOSI, SJ's mother described her daughter's complaint as improper touching by appellant of her breasts and buttocks. There simply is no evidence appellant placed his hands on SJ's genital area. We will modify the findings accordingly.

In all other respects, there is sufficient evidence in the record from which a rational fact-finder could be convinced of appellant's guilt beyond a reasonable doubt. *United States v. Turner,* 25 M.J. 324 (C.M.A. 1987). We are satisfied the remaining evidence is legally and factually sufficient to establish appellant's guilt. *Jackson v. Virginia,* 443 U.S. 307, 99 S. Ct. 2781, 61 S. Ct. 2781, 61 L. Ed. 2d 560 (1979).

SENTENCING INSTRUCTION

Appellant asserts he was prejudiced by the military judge's instruction to the members that "vested" benefits from a prior period of honorable service were not forfeited by receipt of a punitive discharge. The substance of the punitive discharge instruction correctly emphasized the severity of a punitive discharge. We find no prejudicial

error. *United States v. Longhi,* ____ M.J. ____, ACM S28621 (A.F.C.M.R. Mar. 5, 1993); *United States v. Hansen,* 36 M.J. 599, 611-12 (A.F.C.M.R. 1992).

CONCLUSION

We have examined appellant's remaining assignments of error and find they are without merit. Mil. R. Evid. 403, 803(2), 803(4), 803(24), 804(b)5; and R.C.M. 917(d).

In view of our conclusion above, we amend specification 2 of Charge II to read

> In that . . . , did, . . . on divers occasions between on or about 1 July 1990 and 28 December 1990, wrongfully commit indecent acts upon the body of SJ, a female under 16 years of age, not the wife of the said Staff Sergeant James C. Morgan, by putting his hands upon her breasts and buttocks with the intent to appeal to the sexual desires of the said Staff Sergeant James C. Morgan.

We are convinced beyond a reasonable doubt of appellant's guilt of Charge III and its specification, and Charge II and specification 2, as amended.

Reassessing the sentence based on our findings, we find appropriate, only so much of the sentence as provides for a bad-conduct discharge, confinement for 2 years, and reduction to E-1.

The findings and sentence, as modified, are correct in law and fact. Article 66(c). Accordingly, they are,

AFFIRMED.

Senior Judge O'HAIR and Judge SNYDER concur.

[SEAL OMITTED]

OFFICIAL

/s/ Naomi D. Allen
NAOMI D. ALLEN
Technical Sergeant, USAF
Chief Court Administrator, AFCMR

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